Textualism and Culpability of the Reader

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Introduction

A great divide in statutory interpretation has been between purposivism and textualism.[2] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn2) Textualism has largely won this debate and has gained extensive popularity in contemporary legal culture over purposivism.[3] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn3) However, simply deciding to employ textualism over intentionalism does not fully resolve cases in many situations. In *Bostock v. Clayton County*, the majority, written by Justice Gorsuch, using the meaning of the language enacted by Congress in 1964, employed textualism to determine that Title VII's prohibition on discrimination "because of . . . sex" included discrimination based on sexual orientation.[4] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn4) The dissent, written by Justice Alito, argued that the majority was not employing textualism at all, and that textualism actually led to the opposite conclusion.[5] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn5)

This is not a new phenomenon. Throughout the Supreme Court's recent history, different lawyers and judges have employed "plain meaning" differently based on their adopted definition of "plain meaning."[6] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn6) In *Smith*, both Justice O'Connor's majority opinion and Justice Scalia's dissent claimed to be appealing to ordinary meaning.[7] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn7) Scalia interpreted the phrase "use a firearm" "during and in relation to" a drug trafficking crime as being limited to using a firearm as a weapon.[8] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn8) In contrast, the majority interpreted the statutory language "us[ing] a firearm" to not only include the use of the firearm as a weapon, but also the act of trading a firearm for drugs, expanding

beyond Scalia's interpretation.[9] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn9) Both the dissent and the majority characterized their interpretation as the ordinary meaning of the text despite having different outcomes.[10] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn10)

Similarly, as noted by scholars such as Victoria Nourse, textualists have not definitively determined what version of plain meaning they will use.[11] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn11) The common trend seems to lean towards expansive, legalist meaning.[12] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn12) An alternative to this expansive meaning is using prototypical meaning that represents the most common or first thought-of meaning in a given context.[13] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn13) The divide in *Smith* could be described as a divide between expansive and prototypical meaning, with using a firearm 'as a weapon' being the most prototypical meaning. The conclusion of Nourse's article is the that textualists should clarify what type of plain meaning he or she is using when interpreting statutory text.[14] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn14)

The line between prototypical and expansive is often blurry. This paper proposes a different framing for the divide between the types of "plain meaning" in terms of the degree to which a typical reader would be aware of its meaning. This distinction implicates the culpability of the individual governed by the statute. Employing textualism should be informed by one of the primary benefits of textualism over intentionalism: fair notice to those under the statute.[15] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn15) The permissible meanings of a statute must therefore be in some way tied to the ability of the target of the statute to fairly determine the meaning. If a meaning is completely outside the reasonable contemplation of the target audience of a statute, then that target cannot be said to be fairly on notice as to the meaning of the statute. This would leave out highly unintuitive legalistic meanings that an ordinary reader of the statute could not reasonably contemplate. If a reasonable person would contemplate that meaning, even if that person was not sure whether that meaning is in the statute, then that would potentially be sufficient notice. This framing allows us to recognize a third category of textual meaning as well: a technical meaning that is the full logical extension of a phrase to the point where a reasonable person would not even contemplate that meaning.

I. "Reasonable to Know" Meanings and "Reasonable to Contemplate" Meanings

When framed in terms of culpability, the divide between expansive and prototypical meaning can be described as a divide between a reasonable reader knowing that a particular act *is* covered and a reasonable reader knowing an act *might* be covered. A person would be culpable to some degree if she committed an act that a reasonable person would know to be forbidden or a reasonable person might not know but would contemplate that it might be forbidden. The former involves a higher level of culpability than the latter, but the latter is still nonzero culpability.

Therefore, there are two possible standards by which we can grant meaning to a statute. The first, which is similar to prototypical meaning, is that a statute simply means what a reasonable person would know it to mean. The second, similar to expansive meaning, would include anything a reasonable person would contemplate it encompassing.

This difference can be elucidated by example. Say we have a statute: "One cannot sell fruits in this area." A reasonable person would know with certainty that a strawberry was covered by the statute. Therefore, a strawberry would be covered by the statute by the narrower standard of "reasonable to know." On the other hand, a reasonable person would pause at the question of whether tomatoes are covered. A reasonable person might not be sure that tomatoes are or are not covered. But if the reasonable reader were trying to sell tomatoes and knew of this statute, she would pause to consider the possibility and may seek counsel.

In both of these situations, the fruit seller can be said to have nonzero culpability if she proceeds with her act. If she attempted to sell strawberries while knowing of the statute, she would be at least negligent with respect to governing law. Not knowing that strawberries were covered would be negligent because a reasonable person would know that strawberries fall within the meaning of the word fruit. If she decided to sell tomatoes, she would be negligent if she did not pause at all because a reasonable person would know to pause and potentially investigate further.

These two types of negligence are "reasonable to know" and "reasonable to contemplate." The former type of negligence is of a higher degree of culpability than the latter, but both would fall under the Model Penal Code's (MPC) definition of negligence, which is when a "reasonable person" would be aware of a "substantial and unjustifiable risk" that his or her conduct is of a prohibited nature, will lead to a prohibited result, and/or is under prohibited attendant circumstances, and the actor was not so aware but should have been.[16] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn16) Therefore, the reasonable person would not have to know that the conduct is prohibited, just know that there is a substantial risk that the conduct is prohibited.

This "reasonable to contemplate" standard is not as expansive as the most expansive usages of textualism. It would prevent any arcane and unknowable legalist meaning from controlling, unlike some formulations of expansive meaning that include technical meanings. It also prevents the intention of the legislature from controlling when that intent is not evident from the statute.

Negligence is the bare minimum standard in terms of culpability.[17] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn17) However, when determining if a defendant is guilty of committing a crime, the standard of culpability is generally evaluated with respect to elements of the statute to determine if a defendant committed an "action" with the requisite mental state; to further clarify, whether a defendant is guilty of a crime is not determined by asking if the defendant knew her act was illegal. In criminal law generally *mens rea* with respect to governing law, or knowing that something is against the law, is not necessary to find culpability.[18] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn18) For example, one does not have to know that burglary is a crime to knowingly entering someone else's property with intent to commit a crime. A reasonable person can generally be convicted of a crime without having personal knowledge of the law. This may be because there is now a presumption that there are too many laws for our system to always operate based on one having knowledge with respect to governing law, and that people in general are on notice to the fact that there might be a law governing a variety of actions. Additionally, it may be expected that a reasonable person knows what actions are generally considered immoral, such as burglary, without having to expressly know whether or not a statute exists to make such an action illegal.

However, there's also a principle in criminal law that if one does look at a statute, or attempt to know what the governing law is, then that individual has the right to rely on the statute, or an official's formulation of the law, under certain circumstances.[19] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn19) Further, laws can be void for vagueness if a law is so vague that a reasonable person could not know what the law covers.[20] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn20) Finally, the rule of lenity holds that ambiguous criminal statutes should be construed in favor of defendants, though it's been limited to cases of "grievous ambiguity".[21] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn21) So, while knowledge of governing law is not generally considered by courts when no effort was made by the criminal defendant to discover the law, courts do consider a criminal defendant's *ability* to learn the law.[22] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn22) So, in the context of a retail store, since a statute barring the sale of fruit would not comport with generally understood morality, it may be more likely that some kind of warning other than just the statute's existence should be present. Further, the United States Supreme Court has held that putting statutes behind a paywall or copyright is prohibited.[23] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn23) When one does decide to seek out the law, the law is required to be accessible — giving the reader at least some kind of constructive notice.

If a primary purpose of textualism and plain meaning is to further this principle of accessibility of law, "reasonable to contemplate" seems like the outer bounds of the meanings that would be permissible, preventing any really unknowable meanings from making it in. Textualists then must decide which, between these standards, "reasonable to know" or "reasonable to contemplate," to employ.

In *Smith*, Scalia's meaning would fall under a "reasonable to know" formulation, as any reasonable person looking at the statute would know that using a firearm as a weapon would be covered.[24] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn24) There is a question of whether Justice O'Connor's understanding of "use a firearm" in any way would be covered under a "reasonable to know" standard, but it would very likely be covered under a "reasonable to contemplate" standard.[25] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn25)

Another example in which the majority and the dissent were divided on the interpretation of the meaning of a statute is in *Small v. United States*.[26] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn26) In this case, the majority took "any court" to mean any court within the United States and not foreign courts.[27] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn27) The dissent, joined by Justice Scalia, was of the opinion that "any court" extended to foreign courts.[28] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn28) What is notable is that Justice Scalia seems to have joined an expansive meaning in *Small* whereas in *Smith* he subscribed to a prototypical meaning. This shows how imprecise even the same person asserting textual meaning without specifying what type of textual meaning can be.

Under expansive meaning, Justice Gorsuch's textual reading of Title VII in *Bostock v. Clayton Cnty., Ga* is entirely valid.[29] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn29) Even at the time of its passage, it may have been reasonable to at least contemplate that Title VII would bar discrimination based on sex stereotyping. A reasonable employer is therefore on some level of notice if they were to read Title VII. If an employer were to read Title VII and proceed to discriminate based on sexual orientation alone, one may conclude that the employer would be acting with at least negligence. Therefore, discrimination on the basis of sexual orientation could fall under the textual meaning of the statute.

II. Technical Meaning as a Third Category of Meaning

It is possible for some logical extensions of meanings to be totally outside what is even reasonable to contemplate. For example, there may be some vegetable that current science is unaware is actually a fruit. Logically, that vegetable should be considered a fruit, just no one would reasonably be aware of that fact. Nourse grouped these technical meanings with expansive meanings,[30] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn30) but if we use the lens of culpability, we can distinguish expansive meanings that people have some notice of from meanings that a reasonable person would not even contemplate.

Reasonable to contemplate meanings are therefore situated between prototypical and technical meanings in terms of accessibility and dependence on science. Therefore, we have not two, but actually three possible meanings that could all plausibly be called the textual meaning.

In *Smith*, neither Scalia nor O'Connor asserted a technical meaning.[31] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn31) A technical meaning of this statute was asserted in *Bailey vs. United States*.[32] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn32) In *Bailey*, the government asserted that "use a firearm" included the defendant Robinson having a firearm in her apartment while she was conducting a drug trafficking transaction.[33] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn33) The government argued that she was "using" the firearm for self-defense in a passive sense in that it was present while she was trafficking drugs, even though the firearm was unloaded and locked in a trunk in the closet.[34] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn34) This meaning of "use a firearm" is arguably beyond what is "reasonable to contemplate." O'Connor wrote for a unanimous court, but this time in favor of the more limited meaning of "use."[35] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn35) The Court held that "use" in this context must involve "active employment."[36] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn36) This is a meaning that is more expansive than Scalia's *Smith* dissent equating "use" to "use as a firearm,"[37] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn37) but less expansive than using a firearm in a passive way as argued by the government in *Bailey*.[38] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn38) The below scheme is a framework to describe different textual meanings.

Example Phrase	Prototypical Meaning (reasonable to know)	Expansive Meaning (reasonable to contemplate)	Technical Meaning (reasonable person would not contemplate)
"use a firearm"	Use a firearm as a weapon (Scalia)	Use a firearm in an active way, e.g. trading it for drugs (O'Connor)	Use a firearm in a passive way (government in U.S. v. Bailey)
Discrimination because of ... sex"	Discrimination based on gender identity	Discrimination based on sex stereotyping, including sexual orientation	Discrimination based on aspects of sex yet unkown
Fruit	e.g. Strawberries	e.g. Tomatoes	Something which no one yet knows is a fruit

[39] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn39) [40] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn40) [41] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn41) [42] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn42)

III. The Case for Expansive Meaning

Textualists generally disclaim use of technical meaning when they define textualism and, instead, favor defining textualism as using what meaning a reasonable person would understand the statute to mean.[43] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn43) When technical meaning is used, instead of what is reasonable to contemplate, we lose the culpability element since it is, at a minimum, seemingly unjust to find one culpable for what one cannot contemplate. Another reason we should not use these fully extended logical meanings is that Congress may not have the technical ability in each case to know the full logical meaning used by the court.

I submit that expansive meanings should not be written off like technical meanings and should be available for use. This is because a reader is still culpable with respect to governing law when they commit an act under expansive meaning. If culpability and accessibility of the law is to be the driving force in determining law, then the dividing line is between expansive meaning and technical meaning, not between prototypical meaning and expansive meaning.

Choosing between the prototypical meaning and the expansive meaning in any given case may come down to stare decisis, legislative history, or policy considerations. But if a court wanted to stick with just one type of meaning in every case, expansive meaning seems to be a better choice than prototypical meaning.

It is somewhat difficult to find a formalist principle that actually distinguishes prototypical and expansive meaning in terms of what should be applied. Both standards would apply the MPC's definition of negligence, "aware of a substantial and unjustifiable risk," where applicable.[44] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftn44)Prototypical meaning does not cover all the instances in which there would be a substantial risk of proceeding. Therefore, solely based on culpability of the reader, the most principled place to draw the line of textual meaning would be where a reasonable person would detect a substantial risk, meaning the expansive meaning.

Other instrumental advantages may go either way. Using "reasonable to know" would basically be like saying "if you're unsure, then it's not covered." That would allow people to proceed without looking up their specific circumstance, which may be an instrumental advantage.

The line for what is reasonable to contemplate is at least marginally clearer than the line for what is reasonable to know. This is because what is reasonable to contemplate is aligned with the logical extension of the definitions of words, whereas what is reasonable to know depends more on subjective evaluations on what is the most common usage. The procedure for determining expansive meaning would be to figure out the furthest logical extension, then cut off the applications that a reasonable person would not even contemplate.

Prototypical meaning is also at least marginally more variable between parts of the U.S. than expansive meaning is. In some parts of the U.S., it might be considered reasonable to know that a tomato is a fruit. However, that might not be the case everywhere. One may argue that the expansive meaning of "fruit" is more dependent on botany rather than common regional usages. Therefore, it's clearer and more consistent to use the expansive, logical meaning. By the same token, it's easier for Congress to use expansive meaning to legislate rather than trying to figure out what the prototypical meaning is.

Conclusion

What is considered the textual meaning can vary depending on what level of typicality one adopts when reading. Using culpability of the reader as a lens allows us to discern three meanings with decreasing typicality: prototypical, expansive, and technical. What makes expansive meaning the best meaning to use is that it is the logical extension of a meaning up until the point where a reasonable person would not even contemplate it. The expansive meaning is easier to discern and uniform than the prototypical meaning because it is informed by the logical extension of the words to a greater degree than the prototypical meaning. However, it does not go so far as to be inscrutable, like the technical meaning.

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[2] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref2) Robert A. Katzmann, Judging Statutes.

[3] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref3) Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 2, 29–30 (2006) ("Textualists have been so successful discrediting strong purposivism, and distinguishing their new brand of 'modern textualism' from the older, more extreme 'plain meaning' school, that they no longer can identify, let alone conquer, any remaining territory between textualism's adherents and nonadherents.").

[4] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref4) Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1737–39, 1741 (2020).

[5] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref5) *Id.* at 1755–56.

[6] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref6) *See* Michael L. Geis, *The Meaning of Meaning in the Law*, 73 Wash. U. L. Q. 1125, 1126 (1995).

[7] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref7) *Id.* at 1134 ("[T]hey each claim that they are proffering the 'ordinary meaning' of the phrase."); Smith v. United States, 508 U.S. 223, 228, 242 (1993).

[8] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref8) *Smith*, 508 U.S. at 245–46.

[9] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref9) *Id.* at 240–41 ("Both a firearm's use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1) . . . .").

[10] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref10) *Id.* at 228, 242.

[11] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref11) Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 Brook. L. Rev. 997, 997, 1005 (2011).

[12] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref12) *Id.* at 1003.

[13] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref13) *Id.* at 1000–01.

[14] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref14) *See id.* at 1005.

[15] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref15) Note, *Textualism as Fair Notice*, 123 Harv. L. Rev. 542, 542 (2009).

[16] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref16) Model Penal Code §2.02 (Am. Law Inst. 2019).

[17] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref17) *See id.*

[18] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref18) United States v. Baker, 807 F.2d 427, 428–29 (5th Cir. 1986).

[19] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref19) Commonwealth v. Twitchell, 617 N.E.2d 609, 619 (Mass. 1993).

[20] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref20) *See* Skilling v. United States, 561 U.S. 358, 402–03 (2010) ("To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983120391&pubNum=0000708&originatingDoc=I89bc77087fa711dfbe8a8e1700ec828b&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (1983))).

[21] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref21) *Muscarello v. United States*, 524 U.S. 125 (1998).

[22] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref22) See *Baker*, 807 F.2d at 428-29; *Twitchell*, 617 N.E.2d at 619.

[23] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref23) Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1503–04, 1508 (2020).

[24] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref24) *See* Smith v. United States, 508 U.S. 223, 241–44 (1993).

[25] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref25) *See id.* at 240–41.

[26] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref26) *See* 544 U.S. 385, 387–88 (2005).

[27] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref27) *Id.* at 387.

[28] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref28) *Id.* at 397–98.

[29] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref29) *See*, 140 S. Ct. 1731, 1737-39 (2020).

[30] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref30) *See* Nourse, *supra* note 11, at 1002–03.

[31] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref31) *See* Smith v. United States, 508 U.S. 223 (1993).

[32] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref32) *See* Bailey v. United States, 516 U.S. 137 (1995).

[33] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref33) *Id.* at 142–43, 49.

[34] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref34) *Id.* at 149.

[35] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref35) *Id.* at 149–150.

[36] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref36) *Id.* at 144. ("We conclude that the language, context, and history of § 924(c)(1) indicate that the Government must show active employment of the firearm.").

[37] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref37) Smith v. United States, 508 U.S. 223, 242 (1993).

[38] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref38) *See Bailey*, 516 U.S. at 148–149.

[39] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref39) *See Smith*, 508 U.S. at 242 (1993).

[40] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref40) *See id.* at 240.

[41] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref41) *See* 516 U.S. at 148–49.

[42] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref42) *See* Bostock v. Clayton Cnty., Ga., 140 S.Ct. 1731, 1737 (2020).

[43] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref43) *See* John F. Manning, *What Divides Textualists from Purposivists*, 106 Colum. L. Rev. 70, 76 (2006) ("Textualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances.").

[44] (applewebdata://AA30E3AD-2FDA-4A3D-A1A3-0341A6919789#_ftnref44) Model Penal Code §2.02 (2019).

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